Supreme Court, U.S.
FILED
MAR 2 1993
OFFICE OF THE CLERK

No. 92-1317

In the Supreme Court of the United States

October Term, 1992

JOHN J. BOYLE,

Petitioner,

v.s.

LOUISE SCHMITT, as Ancillary Personal Representative of the Estate of Blanche E. Boyle, deceased and LOUISE SCHMITT, Individually

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Robert M. Brake, Esquire
Attorney for Respondents
1830 Ponce de Leon Blvd.
Coral Gables, Florida 33134
(305) 444-1694

No. 92-1317

In the Supreme Court of the United States

October Term, 1992

JOHN J. BOYLE,

Petitioner,

v s .

LOUISE SCHMITT, as Ancillary Personal Representative of the Estate of Blanche E. Boyle, deceased and LOUISE SCHMITT, Individually

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Robert M. Brake, Esquire
Attorney for Respondents
1830 Ponce de Leon Blvd.
Coral Gables, Florida 33134
(305) 444-1694

TABLE OF CONTENTS

	Page
Table of Citations	ii
Text of Constitutions, Statutes and Rules	v
Statement of the Case	1
Summary of Argument	2
Argument	3
Relevancy and Materiality	3
Raising the Federal Question in State Court	4
Opportunities	4
Effect of Failure to Do So	5
Conclusion	7

TABLE OF CITATIONS

Page

Constitutions

United States Constitution, 14th Amendment..... 2, 4, 5, 6, 7

Florida Constitution, Section 9, Article 1..... 7

Statutes

28 USC Section 1257 7

Florida Evidence Code (Florida Statutes Section 90.401 and 90.402)..... 3

Rules

Federal Rules of Evidence (Rule 402)..... 3

Florida Rule of Appellate Procedure 9.030 (a) (2) (A) (v) [32 Florida Statutes Annotated 349]..... 6

Florida Rule of Appellate Procedure 9.120, "Discretionary Proceedings to Review Decisions of District Courts of Appeal" (32 Florida Statutes Annotated 478) 6

Florida Rule of Appellate Procedure 9.300, (387 So. 2d 920 and 32 Florida Statutes Annotated 623)..... 5

Florida Rule of Appellate Procedure 9.330 (32 Florida Statutes Annotated 639) 5

Page

Cases

Bird v. United States, 180 US 356, 45 L. Ed. 570, 1 S.Ct. 403 3

Brinkerhoff-Faris Trust and Savino,s Co. v. Hill, 1930, 281 US 673, 50 S.Ct. 451, 74 L. Ed. 1107 5

United States v. Corwin, 129 US 381, 32 L. Ed. 710, 9.S. Ct. 318 3

Webb v. Webb, 1981, 451 US 493, 101 S.Ct. 1889, 68 L. Ed. 2d 392 ..... 7, 8

Texts

29 Am Jur. 2d Evidence, Section 251, Page 299 3

29 Am. Jur. 2d Evidence Section 251, Page 299 at 301, note 7 3

29 Am. Jur. 2d Evidence Section 252, Page 302 3

23 Fla Jur 2d Evidence and Witnesses, Section 123, Page 150 3

TEXT OF

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution Article XIV Section 1

> ...nor shall any State deprive any person of life, liberty or property without due process of law.

Florida Constitution, Section 9, Article 1. Due process.

> No person shall be deprived of life, liberty or property without due process of law...

28 USC Section 1257 .

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari...where any title, right, privilege or immunity is specially set up or claimed under the Constitution... of...the United States

Florida Evidence Code Florida Statutes Section 90.401. Definition of Relevant Evidence.

> Relevant evidence is evidence tending to prove or disprove a material fact.

Florida Evidence Code Florida Statutes Section 90.402. Admissibility of Relevant Evidence.

> All relevant evidence is admissible, except as provided by law.

Federal Rules of Evidence (Rule 402). Relevant Evidence Generally Admissible, Irrelevant Evidence Inadmissable.

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Florida Rule of Appellate Procedure 9.030 (a) (2) (A) (v) Discretionary Jurisdiction.

> The discretionary jurisdiction of the Supreme Court may be sought to review
>
> (A) decisions of district courts of appeal that...
>
> (v) pass upon a question certified to be of great public importance.

Florida Rule of Appellate Procedure 9.120, Discretionary Proceedings.

> ...(d) Briefs on Jurisdiction. Petitioner's brief, limited solely to the issue of the Supreme Court's jurisdiction and accompanied by an appendix containing a conformed copy of the decision of the district court of appeal, shall be served within 10 days of filing the notice...

Florida Rule of Appellate Procedure 9.300. Motions

> (a) Contents of Motion; Response.
>
> Unless otherwise prescribed by these rules, an application for an order or other relief available under these

> rules shall be made by filing a motion therefor. The motion shall state the grounds on which it is based, the relief sought, argument in support thereof and appropriate citations of authority . . .

Florida Rule of Appellate Procedure 9.330

(a) Time for Filing; Contents; Reply.

> A motion for rehearing or for clarification of decision may be filed within 15 days of an order or within such other time set by the court. The motion shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not re-argue the merits of the court's order. A reply may be served within lO day of service of the motion.

STATEMENT OF THE CASE

The Petitioner, John J. Boyle, as third party beneficiary, sought to enforce against his mother (and, after her death, her estate) a contract between his mother and father in which his parents mutually promised each other that each would make a will leaving the bulk of his or her estate to Petitioner. His mother, and later, his mother's estate, defended on the grounds, inter alia, that the contract was unilaterally revoked by her or, in the alternative, was revoked by the parents jointly. The estate advanced the following legal theories in support thereof:

1. Where the sole consideration for a contract to make a will is the mutual promises of each party to make a will in accordance with the terms of the contract, then any party to the contract may unilaterally rescind the contract while all parties are alive, so long as notice of the revocation is given to all other parties so as to enable them to change their testamentary dispositions accordingly. The parties stipulated that the mother made a statement of revocation of the contract and that said statement was communicated to the father during their joint lifetimes.

2. The parties to such a contract could mutually revoke the contract during their joint lifetimes. Execution of new mutual wills, or separate wills which were inconsistent with the terms of the contract and whose existence and contents were communicated to the other, constituted evidence of such a revocation agreement. Several such wills were introduced into evidence.

The trial court accepted these defenses and entered a judgment for the estate. The son appealed to the Third District Court of Appeal of Florida, which affirmed the trial court and wrote an opinion which covers six pages of the Appendix to the son's Petition for Certiorari.

In the penultimate paragraph of its Opinion the Court added to the last sentence thereof a parenthetical phrase commenting on the conduct of the son towards his mother, which conduct ostensibly formed the motive for her rescission of the contract.

The son has filed a Petition for Certiorari based upon his assertion that:

1. The parenthetical phrase describing his actions and his mother's motives constitutes a ruling on one of the mother's equitable defenses.

2. This equitable defense had been set aside by the trial court for a later hearing in the event that the Court ruled in favor of the son on the right to revocation issue.

3. As a result the son did not have a chance to present evidence as to whether his mother's motives were justified or if he was equitably estopped from enforcing the contract.

4. This inability to present such evidence constitutes a deprivation of his right to a hearing on this issue under the 14th Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

1. The issue of the mother's motive for rescinding the contract is irrelevant and immaterial to the questions before the courts below. The issues before the courts below were whether or not the mother had a right to make a unilateral rescission of the contract regardless of her motives, or whether a joint revocation was made by both parents. A litigant is not deprived of a constitutional right to a hearing by the rejection of irrelevant and immaterial evidence.

2. The son had six opportunities to present the question of motive to the courts below. The son used three of those six opportunities to comment on the fact that he had not had an opportunity to present evidence on that issue. At no time did he articulate any connection between such a lack of a hearing and the 14th Amendment to the Constitution of the United States. This Court therefore has no jurisdiction to grant a Writ of Certiorari in this cause because of the failure of the son to raise the Constitutional issue in the state court.

ARGUMENT

I. RELEVANCY AND MATERIALITY

Evidence on the issue of the mother's motive in unilaterally rescinding the contract was neither relevant nor material to the legal issues of the right to rescission.

Both the Federal Rules of Evidence (Rule 402) and the Florida Evidence Code (Florida Statutes Section 90.401 and 90.402) require that evidence must be relevant in order to be admissible.

It is black letter law that relevancy refers to the tendency to prove or disprove a material fact, and materiality refers to a fact which is in issue (29 Am Jur. 2d Evidence, Section 251, Page 299).

Facts and circumstances which do not throw any light upon the point in issue are not properly admissible in evidence and upon proper objection must be excluded (29 Am. Jur. 2d Evidence Section 251, Page 299 at 301, note 7 citing, inter alia, Bird v. United States, 180 US 356, 45 L. Ed. 570, 1 S.Ct. 403, and United States v. Corwin, 129 US 381, 32 L. Ed. 710, 9.S. Ct. 318). The test is one of logic as applied to each case (29 Am. Jur. 2d Evidence Section 252, Page 302; 23 Fla Jur 2d Evidence and Witnesses, Section 123, Page 150).

In the case at bar the material facts were admitted. The son stipulated that he was present when his mother repudiated the contract; that his father was alive at that time; and that the son communicated the repudiation to the father. The father, who is still living, testified that he learned of his wife's repudiation of the contract from his son while his wife was still alive.

In addition, inconsistent wills executed by the parents after the execution of the contract were admitted into evidence.

The question before the court then became: As a matter of law was the contract effectively repudiated?

The motive of the mother was not material to the legal issues. The motive of the mother was not relevant to the facts, since motive could neither prove nor disprove repudiation. Having decided that the right of repudiation existed, and that it was exercised, the court properly ignored the son's request for a hearing on facts concerned with motive.

Inability to present irrelevant and immaterial evidence has never been held to be a deprivation of due process under the 14th Amendment. Therefore, the petitioner/son has not been deprived of due process in this case.

2. RAISING THE QUESTION IN STATE COURT.

a. The Petitioner/son had six opportunities to present his objection to consideration of his mother's motive in repudiating the contract. He availed himself of three of these opportunities. At no time did he mention the 14th Amendment to the United States Constitution. As a result, this Court has no jurisdiction to grant his petition because he failed to raise the issue in state court.

i. First Opportunity: His Reply Brief

In the statement of facts in its Answer brief to the Third District Court of Appeal of Florida, the Estate recited the son's participation in his father's dissolution action, citing the pages of the appellate record where those facts appeared.

In its argument in said brief the estate made the statements quoted and cited by Petitioner on pages 4 and 5 of his brief.

John J. Boyle then filed a Reply Brief in the 3rd District Court of Appeal in which he devoted 27 lines, or approximately 270 words, answering those statements and objecting to the consideration of those statements. Although the argument is identical to the argument raised in the Petition to this Court as a federal question, nowhere in that passage does he mention the 14th Amendment or the fact that the statements raise a federal, as well as a state, question.

ii. Second Opportunity: Motion to Strike

Florida Rule of Appellate Procedure 9.300 provides for liberal motion practice. The rule is set out in 387 So. 2d 920 and 32 Florida Statutes Annotated 623. John J. Boyle could have filed a Motion to Strike those portions of the estate's brief and to limit argument on the issues based, inter alia, on the 14th Amendment and Federal grounds. He failed to do s o .

iii.Third Opportunity: Oral Argument

The matter was brought up again during oral argument. At that time John J. Boyle could have cited the 14th Amendment and argued that the matter was a federal question. He failed to do so.

iv. Fourth Opportunity: Motion For Rehearing

Florida Rule of Appellate Procedure 9.330 (32 Florida Statutes Annotated 639) authorizes the filing of a Motion for Rehearing or Clarification. The Rule provides that

> "The motion shall state with particularity the points of law or fact which the Court has overlooked or misapprehended. The motion shall not reargue the merits of the Court's Order."

John J. Boyle could have pointed out the 14th Amendment and the federal question to the Court in such a motion, as the Petitioner did in the case of Brinkerhoff-Faris Trust and Savings Co. v. Hill, 1930, 281 US 673, 50 S.Ct. 451 74 L. Ed. ,1107, cited by John J. Boyle on page 7 of his Petition. John J. Boyle failed even to file a Petition for Rehearing.

v. Fifth Opportunity: Petition For Certification To Supreme Court of Florida .

Florida Rule of Appellate Procedure 9.030 (a) (2) (A) (v) [32 Florida Statutes Annotated 349] allows the various District Courts of Appeal to certify questions to the Supreme Court as being of great public interest. The litigants may request such a certification by motion. Had John Boyle wished to do so he could have filed such a motion and included in it a 14th Amendment argument. He failed to do so.

iv. Sixth Opportunity: Petition for Discretionary Hearing by Supreme Court of Florida

Florida Rule of Appellate Procedure 9.120, "Discretionary Proceedings to Review Decisions of District Courts of Appeal" (32 Florida Statutes Annotated 478), provides that a party may invoke the discretionary jurisdiction of the Florida Supreme Court by filing a Notice and a brief limited solely to the issue of the Supreme Court jurisdiction. John Boyle filed such a Notice and Brief.

In his brief on jurisdiction, John J. Boyle raised the motive issue by stating (page 9):

> "The district court parenthetically gave two other bases for its decision: (1) that the will contract had been mutually rescinded (Appendix, 6: N. 5); and (2) that the Petitioner was guilty of inequitable conduct. (Appendix 6).
>
> "...(N)o evidence was taken at trial on the defenses of the petitioner's alleged inequitable conduct. The District Court improperly considered (this) defense( ) without a record basis."

John J. Boyle thus raised the due process issue in his brief but failed to mention the 14th Amendment or the federal question.

b. John J. Boyle thus finds himself in the position of the Petitioner in the case of Webb v. Webb, 1981, 451 US 493, 101 S.Ct. 1889, 68 L. Ed. 2d 392. In that case Petitioner sought review by certiorari of a decision of the Georgia Supreme Court on the question of whether Article IV, Section 1 of the United States Constitution required that Georgia give full faith and credit to a Florida custody decree.

This Court there noted that 28 USC Section 1257 required Petitioner to have specially set up in the Court below her claim to any right under the Constitution of the United States; that nowhere in the record before the Georgia Court was the federal question or constitution mentioned, let alone passed upon; and that although Petitioner did use the phrase "full faith and credit" at several points before the Georgia Court, she did not cite the Federal Constitution or any cases relying on the full faith and credit clause of the Federal Constitution, but instead relied upon the Uniform Trial Custody Jurisdiction Act, adopted by both Georgia and Florida.

This Court then referred to a long history of cases where the Court refused to decide Federal Constitutional issues raised in this Court for the first time on review of State Court decisions; and held that, to raise the Federal question in a case where the question could be decided under either State or Federal law, one must mention the Federal Constitution and make a claim specifically referring to it. This Court then denied certiorari.

The same result should obtain in the case at bar for the same reasons. Since Section 9, Article 1 of the Florida Constitution contains a due process clause which tracks the Fourteenth Amendment to the Federal Constitution, this Court

> "... cannot conclude on this record that Petitioner raised the federal claim that ()he now presents to this Court at any part in the state Court proceedings." Webb v. Webb 101 S. Ct. 1889 at 1892,

but can only

> "...find it far more likely that Petitioner was referring to State law." Webb v. Webb, 101 S. Ct. 1889 at 1893.

In the case at bar there are no policy considerations sufficient to overrule the

> "...powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts." Webb v Webb, 101 S. Ct. 1889 at 1893.

On the contrary, the statements concerning John J. Boyle's treatment of his mother were in the record before the Court and were argued by him in his brief and in his oral argument. They had the function only of supplying a motive for his mother's conduct. Such motive was irrelevant and immaterial to the issue before the Court; was mentioned peripherally and only in passing by the Court; and did not affect the legal principle followed by the Court.

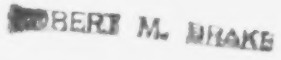
That legal principle had a long and honorable history dating to the English Common Law before the American Declaration of Independence, and had been adopted by several other states without a Constitutional challenge.

If any injustice has been done to Petitioner, it is not so egregious as to warrant an overriding of the statutory prohibition against the assumption of jurisdiction in cases where the federal question was not raised in the Court below.

CONCLUSION

The point raised by Petitioner was irrelevant and immaterial to the issue before the Court. In addition, Petitioner failed to raise any federal question in the Court below. The record in this case does not disclose any fundamental unfairness requiring review by this Court. The Petition for Certiorari should be denied.

Respectfully submitted,



ROBERT M. BRAKE, ESQUIRE
Attorney for Respondent
1830 Ponce de Leon Blvd.
Coral Gables, Florida 33134
(305) 444-1694